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AL RASHIDY KASSIM & ORS

v.

ROSMAN ROSLAN

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FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD FCJ
ARIFIN ZAKARIA FCJ
AUGUSTINE PAUL FCJ
[CIVIL APPEAL NO: 02-16-2005(B)]

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27 APRIL 2007

SUCCESSION: *Administration - Action for possession of land - Estate land of deceased transferred to respondent - Beneficiaries of deceased's estate sought declaration that transfer null and void on ground of fraud*

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allegedly committed by respondent - Whether beneficiaries had locus standi to seek such relief - Special circumstances - Equity - Whether beneficiaries entitled to claim for general and special damages on estate's behalf

LAND LAW: *Transfer - Estate land - Validity of - Beneficiaries of deceased's estate sought declaration that transfer null and void on ground*

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of fraud allegedly committed by respondent - Whether beneficiaries had locus standi to seek such relief - Special circumstances - Equity - Whether beneficiaries entitled to claim for general and special damages on estate's behalf

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In this appeal by the appellants against the decision of the Court of Appeal reversing the High Court's decision, leave was granted by this court on the following two questions of law: (i) whether the beneficiaries of the deceased person, without first obtaining the Letters of Administration, have a *locus standi* to commence an

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action to protect and to regain land which has been fraudulently obtained by an outsider; and (ii) after confirming the finding of fraud, whether the court can direct the registration of the land to the party who had committed the fraud. In the present dispute, the deceased was the registered owner of a 1/2 undivided share

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in a piece of land ('said land') until it was transferred to the respondent. The appellants challenged the validity of the transfer, alleging that the respondent had obtained the transfer through fraudulent means. The appellants claimed that they, as the grandchildren of the deceased, were the lawful beneficiaries of the

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deceased's estate. Having discovered that the respondent had

trespassed onto the said land, the appellants brought this action against the respondent requesting him to vacate the said land and for damages. The High Court found in favour of the appellants but on appeal, the Court of Appeal set aside the order of the High Court and ordered that the memorial in the Issue Document of Title and Register Document of Title in favour of the appellants be cancelled and a memorial in favour of the respondent be entered in respect of the said land. It was further ordered that the Registrar of Land, Gombak enter a Registrar's Caveat against the said land under s. 320(1) of the National Land Code. The appellants appealed against the Court of Appeal's decision. The matter at the heart of the appellants' case was encapsulated in prayer (c) of the claim, in which the appellants sought a declaration that the transfer of the 1/2 undivided share in the said land to the respondent was null and void on the ground of fraud allegedly committed by the respondent. Hence, the only issue that needed to be determined was whether the appellants, as the beneficiaries of the estate of the deceased, had the *locus standi* to seek the declaratory relief as per prayer (c) of the claim.

Held (allowing the appeal, and setting aside the orders of the High Court and Court of Appeal)
Per Arifin Zakaria FCJ delivering the judgment of the court:

(1) Special circumstances should not be confined solely to cases where the personal representative had defaulted in recovering the property of the estate; all the circumstances of the case ought to be considered by the court in arriving at a just result (*Wong Moy (Administratix of the Estate of Theng Chee Khim, (deceased) v. Soo Ah Choy* (foll)). Also, the beneficiary has at least an equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment (*Re Atkinson* (foll); *Omar Ali Mohd & Ors v. Syed Jajaralsadeq Abdulkadir Alhadad & Ors* (foll)). (para 18)

(2) In the present case, the action was commenced by the beneficiaries of the estate in order to regain the said land from the respondent whom they alleged had, by fraudulent means, transferred the land to himself. The respondent had also entered upon the said land and damaged the fruit trees and demolished buildings found there. Further, the said land was liable to be sold by the respondent to a third party. In that event, the said land may be lost forever. This becomes more

urgent in view of the decision of this court in *Adorna Properties Sdn Bhd v. Boonsom Boonyamit* which conferred immediate indefeasible title to a purchaser in good faith for valuable consideration. The appellants thus had to act fast in order to protect and preserve the deceased's estate. Therefore, on the facts of this case, there existed special circumstances for the beneficiaries to commence legal action against the respondent *qua* beneficiaries for the purpose of protecting and preserving the assets of the estate. Quite apart from that, the beneficiaries in the present case had at least an equity in the deceased's estate that would entitle them to seek a declaratory judgment. Thus, on the above grounds, the appellants had the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the estate's assets. (paras 19 & 20)

(3) In this instance, the High Court found that the title to the said land was obtained by the respondent through fraud and declared that the transfer of the said land to the respondent was null and void. The court ordered the respondent to transfer or cause to be transferred the said land to the appellants. The Court of Appeal agreed with the High Court's finding that the respondent had obtained the title to the said land through fraudulent means but ordered the said land to be retransferred to the respondent because of lack of *locus standi*, in the meantime ordering that a Registrar's Caveat be lodged against the said land pending disposal of the suit to be filed by the appellants. In view of this court's finding that the appellants did have the *locus standi* to commence legal proceedings to protect and preserve the estate's assets, the appellants were entitled to the order as prayed for in prayer (c) of the claim. However, the appellants, as beneficiaries, were not entitled to claim for general and special damages on the estate's behalf as such a claim could only be made by the legal representative of the estate. (paras 21 & 22)

[Memorial in favour of respondent in Issue Document of Title and Register Document of Title deleted and memorial in favour of deceased reinstated.]

Bahasa Malaysia *translation of headnotes*

Dalam rayuan oleh perayu-perayu terhadap keputusan Mahkamah Rayuan yang mengakas keputusan Mahkamah Tinggi di sini, mahkamah ini telah memberi kebenaran untuk dua persoalan undang-undang dibangkitkan, iaitu: (i) sama ada waris-waris si mati, tanpa terlebih dahulu memperoleh Surat Kuasa Mentadbir, mempunyai *locus standi* untuk memulakan tindakan bagi melindungi dan mendapatkan kembali tanah yang telah diperolehi oleh seorang orang luar melalui fraud; dan (ii) sama ada mahkamah, selepas menentusahkan fraud, boleh mengarahkan pendaftaran tanah kepada pihak yang melakukan fraud. Dalam pertikaian ini, si mati adalah pemilik berdaftar 1/2 bahagian tak berbelah bahagi sebidang tanah ('tanah tersebut') sebelum ianya dipindahmilik kepada responden. Perayu-perayu mencabar kesahan pindahmilik, sambil berhujah bahawa responden telah memperoleh milikan melalui penipuan. Perayu-perayu mendakwa bahawa selaku cucu-cucu si mati mereka adalah waris sah kepada pusaka si mati. Juga, setelah mendapati responden menceroboh tanah tersebut, perayu-perayu memulakan tindakan di sini bagi memohon gantirugi dan supaya responden mengosongkan tanah tersebut. Mahkamah Tinggi mendapati untuk perayu-perayu, tetapi atas rayuan Mahkamah Rayuan mengenepikan perintah Mahkamah Tinggi sekaligus memutuskan memorial untuk manfaat perayu-perayu pada Geran Hakmilik dan Daftar Hakmilik dibatalkan dan satu memorial untuk manfaat responden dimasukkan sebagai ganti. Diperintahkan selanjutnya bahawa Pendaftar Tanah Gombak hendaklah memasukkan Kaveat Pendaftar terhadap tanah tersebut di bawah s. 320(1) Kanun Tanah Negara. Perayu-perayu merayu terhadap keputusan Mahkamah Rayuan. Teras tuntutan perayu-perayu adalah terangkum pada prayer (c) tuntutan, iaitu untuk mendapatkan deklarasi bahawa pindahmilik 1/2 bahagian tak berbelah bahagi tanah tersebut kepada responden adalah tak sah dan batal disebabkan fraud yang dilakukan oleh responden. Satu-satunya isu yang perlu diputuskan adalah sama ada perayu-perayu, selaku waris kepada pusaka si mati, mempunyai *locus standi* untuk memohon relif deklaratori seperti di dalam prayer (c) tuntutan tersebut.

Diputuskan (membenarkan rayuan dan mengenepikan perintah-perintah Mahkamah Tinggi dan Mahkamah Rayuan)

Oleh Arifin Zakaria HMP menyampaikan penghakiman mahkamah:

(1) Halkeadaan istimewa tidak harus dihadkan semata-mata kepada kes-kes di mana wakil diri telah gagal mendapatkan semula harta-harta pusaka; semua halkeadaan kes boleh dipertimbang oleh mahkamah untuk mencapai satu keputusan yang adil (*Wong Moy (Administratix of the Estate of Theng Chee Khim, (deceased) v. Soo Ah Choy* (diikuti)). Waris juga setidak-tidaknya mempunyai ekuiti di dalam pusaka si mati bagi membolehkannya memohon remedi relif deklaratori (*Re Atkinson* (diikuti); *Omar Ali Mohd & Ors v. Syed Jajaralsadeq Abdulkadir Alhadad & Ors* (diikuti)).

(2) Dalam kes semasa, tindakan dimulakan oleh waris-waris kepada pusaka bagi mendapatkan kembali tanah tersebut dari responden yang mereka dakwa telah memindahmilikkan tanah tersebut kepada dirinya dengan cara fraud. Responden juga telah memasuki tanah tersebut dan telah merosakkan pokok-pokok buah-buahan serta merobohkan bangunan yang ada di situ. Tanah tersebut juga berkemungkinan dijual oleh responden kepada pihak ketiga. Dalam keadaan sedemikian, tanah tersebut mungkin akan hilang buat selama-lamanya. Ia menjadi lebih terdesak apabila diambilkira keputusan mahkamah ini di dalam *Adorna Properties Sdn Bhd v. Boonsom Boonyamit* yang memberi hakmilik tak boleh disangkal serta merta kepada pembeli *bona fide* yang membeli dengan balasan berharga. Perayu-perayu dengan itu harus bertindak tangkas bagi melindungi dan menjaga pusaka si mati. Oleh yang demikian, berdasarkan fakta kes, wujud halkeadaan istimewa bagi waris-waris memulakan tindakan undang-undang terhadap responden *qua* waris-waris bagi maksud melindungi dan menjaga aset-aset pusaka. Selain dari itu, waris-waris di sini paling tidak pun mempunyai ekuiti di dalam pusaka si mati sekaligus memberikan mereka hak untuk mendapatkan penghakiman deklaratori. Atas alasan-alasan ini, perayu-perayu mempunyai *locus standi* untuk memulakan tindakan ini setidak-setidaknya untuk maksud terhad melindungi dan menjaga aset-aset pusaka.

(3) Di sini, Mahkamah Tinggi mendapati bahawa hakmilik tanah tersebut telah diperolehi secara fraud oleh responden dan mengisytiharkan bahawa pindahmilik tanah tersebut kepada responden adalah tak sah dan batal. Mahkamah juga memerintahkan responden supaya memindahmilikkan tanah tersebut kepada perayu-perayu. Mahkamah Rayuan bersetuju dengan dapatan Mahkamah Tinggi bahawa responden telah memperoleh hakmilik tanah tersebut secara fraud tetapi memerintahkan ia dipindahmilik kepada responden disebabkan ketiadaan *locus standi*, dan supaya Kaveat Pendaftar dimasukkan sementara menunggu keputusan tindakan yang difailkan perayu-perayu. Berdasarkan dapatan mahkamah ini bahawa perayu-perayu mempunyai *locus standi* untuk memulakan tindakan undang-undang untuk melindungi dan menjaga aset-aset pusaka, maka perayu-perayu berhak mendapat perintah seperti yang dipohon melalui prayer (c) tuntutan. Bagaimanapun, perayu-perayu, sebagai waris-waris, tidak berhak menuntut gantirugi am dan khas bagi pihak pusaka kerana tuntutan sedemikian hanya boleh dibuat oleh wakil diri pusaka.

[Memorial untuk manfaat responden di dalam Geran Hakmilik dan Daftar Hakmilik dibatalkan dan diganti dengan memorial bagi manfaat si mati.]

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyamit [2001] 2 CLJ 133 FC ***(refd)***

Deraman & Ors v. Mek Yam [1977] 1 MLJ 52 ***(refd)***

Hj Ali Omar & Anor v. Lim Kian Lee & Ors [2002] 8 CLJ 443 HC ***(refd)***

Joseph Hayim Hayim & Anor v. Citibank NA & Anor [1987] AC 730 ***(refd)***

Ng Thau Shing v. George Justine & Other Cases [2005] 6 CLJ 80 HC ***(refd)***

Omar Ali Mohd & Ors v. Syed Jajaralsadeq Abdulkadir Alhadad & Ors [1995] 3 SLR 388 ***(foll)***

Ooi Jim & Anor v. Ai Eit & Ors [1977] 2 MLJ 105 ***(foll)***

Re Atkinson [1971] VR 612 ***(foll)***

Wong Moy (Administratrix of the Estate of Theng Chee Khim, (deceased) v. Soo Ah Choy [1996] 3 SLR 398 ***(foll)***

Legislation referred to:

Kelantan Land Settlement Ordinance 1955, s. 10(1)(a)

National Land Code, s. 320(1)(a)

A *For the appellants - Murad Ali Abdullah (Ahmad Tarmizi Shariff & Chitra Devi Mutusamy with him); M/s Tarmizi Marzuki & Sulaiman*
For the respondent - T Santhakumari (Gurcharan Singh Sohan with her); M/s Mann & Assoc

B *[Appeal from Court of Appeal; Civil Appeal No: B-02-566-2004]*

Reported by Suresh Nathan

C

JUDGMENT

Arifin Zakaria FCJ:

Background

D **[1]** This is an appeal against the decision of the Court of Appeal reversing the decision of the High Court. Leave was granted by this court on two questions of law which read as follows:

(1) whether the beneficiaries of the deceased person without first obtaining the Letters of Administration have a *locus standi* to
E commence an action to protect and to regain the land which has been fraudulently obtained by an outsider; and

(2) after confirming the finding of fraud, whether the court can direct the registration of the said land to the party who had
F committed the fraud.

[2] The subject matter of the dispute is a 1/2 undivided share in a piece of land situated at Batu 17 3/4, Kuang, Rawang, Selangor held under the Issue Document of Title EMR 2900, Lot
G 2439, Mukim Rawang, Selangor Darul Ehsan (the said land). Hj. Abu Bakar bin Hj. Sulaiman (deceased) was the registered owner of the said land until it was transferred to Rosman bin Roslan, the respondent in the present case. The validity of the said transfer was challenged by the appellants who alleged that the transfer was
H obtained by the respondent through fraudulent means.

[3] The appellants claim that they, as the grandchildren of the deceased, are the lawful beneficiaries of the deceased's estate. Having discovered that the respondent had trespassed into the said land they brought this action against the respondent asking
I the respondent to vacate the said land and for damages.

The Findings Of The High Court

[4] On the evidence before the court, the High Court found that:

(1) the appellants were the lawful grandchildren of the deceased;

(2) the deceased had passed away in Indonesia in the year 1937;

(3) the respondent by a statutory declaration claimed that the issue document of title of the said land had been lost from his custody;

(4) in view of the fact that the deceased had passed away in 1937 the Power of Attorney (exh. D1) dated 4 March 1986 could not have been executed by him; and

(5) the respondent had entered upon the said land and cut fruit trees and demolished the houses on the said land.

[5] On the above premise the learned High Court Judge came to his decision that the appellants had on balance of probabilities proven their case against the respondent and entered judgment in favour of the appellants in terms of prayers (c), (d), (e) and (f) of the claim. The court also awarded damages and costs in favour of the appellants.

The Findings Of The Court Of Appeal

[6] On appeal to the Court of Appeal, the order of the High Court was set aside and it was ordered that the memorial in the Issue Document of Title and Register Document of Title in favour of the appellants be cancelled and a memorial in favour of the respondent be entered in respect of the said land. It is further ordered that the Registrar of Land Gombak do enter a Registrar's Caveat against the said land under s. 320(1)(a) of the National Land Code 1965 (the Land Code). The appellants are, however, given the liberty to file a fresh suit against the respondent within 30 days from the date of the order and the Registrar's Caveat shall remain in force until disposal of the suit to be filed by the appellants.

A **The Issues Before This Court**

[7] For completeness, I need to state that the appellants did not commence a fresh suit as suggested by the Court of Appeal but instead filed an appeal against the whole decision of the Court of
B Appeal. As I said earlier, two issues were framed by the leave court for our determination as set out in the opening part of this judgment. The Court of Appeal in its judgment delivered by Nik Hashim, JCA (as he then was) allowed the appeal on the ground that the appellants as beneficiaries have no *locus standi* to bring this
C action without first obtaining the grant of the letters of administration of the estate of the deceased. He stated that the court was constrained by the decision of this court in *Deraman & Ors. v. Mek Yam* [1977] 1 MLJ 52 to decide otherwise. In that case, after a Land Scheme Enquiry, the land in dispute was
D ordered to be registered in the name of the defendant under a possessory title. The plaintiffs who were the children of the original owner did not appeal from that decision but they brought an action purportedly under s. 10(1)(a) of the Kelantan Land Settlement Ordinance 1955 claiming that they were entitled to a
E share in the land. The trial judge dismissed the application and the plaintiffs appealed to this court. The plaintiffs in that case had not taken out letters of administration to the estate of their father. In a majority judgment this court dismissed the appeal. The ground relied upon by the majority was that the plaintiffs/appellants had
F no *locus standi* to institute the action as they had not taken out letters of administration of the estate of their father.

[8] It should however be pointed out that the plaintiffs in that case prayed for an order that the undivided share in the land be
G registered in their names as lawful beneficiaries of the estate of their father. As Ali FJ in his judgment categorically stated:

> …, the appellants have no legal title. They never had. They are only beneficiaries of their father's estate. The only person who could have legal title after their father's death would be the legal
H representatives of the estate. … The action ought to have been dismissed as the appellants have no right or cause of action.

[9] In that case what the court said was that the plaintiffs as beneficiaries have no locus to apply to have their names registered as the registered owner of the undivided share in the land. Thus
I in deciding whether the appellants have the *locus standi* or not in instituting this action, it is necessary to determine what is the

nature of the appellants' claim. The appellants pleaded case was that the respondent who is the registered proprietor of 1/2 share in the said land had obtained the said title through fraudulent means. After a full trial, the High Court found that the appellants had proven their case in that the respondent had obtained his title through fraud. This finding of the trial court was upheld by the Court of Appeal. This explains why the Court of Appeal having allowed the appeal by the respondent then ordered that the Registrar's Caveat be entered against the said land pending disposal of a fresh suit to be filed by the appellants.

[10] In the present case one of the orders prayed for by the appellants reads as follows:

> (c) perisytiharan bahawa pindahmilik tanah tersebut kepada Defendan Pertama adalah batal dan tidak sah di atas alasan fraud yang dilakukan oleh Defendan Pertama di dalam memperolehi pindahmilik tanah kepada Defendan Pertama;.

[11] In short the appellants were asking for a declaration that the transfer of the 1/2 undivided share in the said land to the respondents was null and void and illegal on the ground of fraud allegedly committed by the respondent. That was the matter at the heart of the appellants' case. Looking at the pleading the first question that the court ought to ask itself is, "has the appellants the *locus standi* to institute an action seeking such a declaratory relief?".

[12] The answer to this issue, as we see it, could not be derived from the decision in *Deraman & Ors. v. Mek Yam (supra)*. In that case the appellants/plaintiffs were asking for an order that the 5/10 undivided share in the land be registered in their names as lawful beneficiaries of the estate of Din bin Salleh. This court held that the beneficiaries had no *locus standi* to bring such a proceeding to have the title in the said land registered in their names. They held that the only person who could do so is the legal representatives of the estate and not the beneficiaries. This we think is in accord with the probate and administration law prevailing in this country.

[13] In the present case the only issue that need to be addressed by the court is whether the appellants, as the beneficiaries of the estate of the deceased have the *locus standi* to seek the declaratory relief as per prayer (c) of the claim. In our view the case on point

A is the case of *Ooi Jim & Anor v. Ai Eit & Ors.* [1977] 2 MLJ 105. In that case the first appellant had applied for a declaration that her husband was the lawful adopted son of Jaw Ing who had died intestate. The application was dismissed as it was held that she should first obtain letters of administration of her husband's B estate. She then appealed to this court. Allowing the appeal, this court held that it was not necessary for the 1st appellant to take out letters of administration to bring the action which was primarily an action for a declaration as to the status of her husband. The court stated that the question of taking out letters of C administration would only arise when it became necessary for her to claim her share in the estate of the intestate. No authority was cited by the court in support of its decision. But the following cases seem to support the finding of this court in *Ooi Jim*. First, the Singapore case of *Omar Ali bin Mohd. & Ors v. Syed* D *Jajaralsadeq bin Abdulkadir Alhadad & Ors* [1995] 3 SLR 388, which was cited to us by learned counsel for the appellants. In that case the plaintiffs sought declarations that the unexpired residue of the leasehold interest of 999 years in a property vested in the estate of the father of the plaintiffs (the intestate) and that E the purported sale of the property by the first four defendants (who are the trustees of the estate of the holder of the reversion to the property) to the fifth defendant, in so far as it included the leasehold interest of the intestate's estate, was null and void. The first four defendants applied for security for costs on the ground F that the plaintiffs were ordinarily resident out of jurisdiction. They claimed, *inter alia*, that the plaintiffs had no legal authority whatsoever to institute the present action; no one had the legal authority to act on behalf of the estate of the intestate until he or she had applied to the court for a grant of letters of G administration. The learned assistant registrar allowed the application. Chao Hick Tin J, allowed the appeal by the plaintiffs holding, *inter alia*, that the plaintiffs were not suing on behalf of the estate. They were suing in their own capacity as beneficiaries of the estate for a declaration to protect the property of the H estate and to prevent the sale of the property to the fifth defendant from going through. This they had the *locus standi* to do as they had at least an equity in the estate of the intestate. In coming to his decision the learned judge adopted the view expressed by Gillard J in *Re Atkinson* [1971] VR 612, where I Gillard J held that where there were competing claims then the

trustee company was not bound to use its own fund to vindicate the testator's rights, if any. If it had obtained an indemnity from the beneficiaries, other considerations might well have applied. On the issue of whether the beneficiaries and, in particular, the son, would have the necessary standing to bring an action against the widow to vindicate the testator's interest, he expressed the view that the beneficiaries had at least 'an equity' to entitle him to seek on behalf of the estate in a court of equity the remedy of a declaratory judgment; and 'an equity' means a right to a remedy in a court of equity. Chao Hick Tin J then went on to say that:

> Of course in the present case no letters of administration to the estate of the intestate have yet been granted to any one. But I do not think this difference was in any way material; neither did I think this difference made any less applicable the views of Gillard J. Thus I felt that there was no merit in the arguments of the first four defendants based on lack of *locus standi*, which was their main plank on their request for further arguments.

[14] In the local case of *Hj. Ali Omar & Anor v. Lim Kian Lee & Ors* [2002] 8 CLJ 443, the plaintiffs applied for a declaration that the transfer of the deceased's property to the defendants was null and void and for the re-transfer of the property to the deceased's name. At the time of making the application the letters of administration in respect of the estate had not been extracted. The issue was whether the plaintiffs had the *locus standi* to bring and maintain the suit. The learned J.C. following *Ooi Jim* held that the declaratory relief sought for is not confined to the declaration of status alone. Thus the court granted the declaration sought by the plaintiffs that the transfer of the land, the deceased's property, to the defendant was null and void. The court held that, the plaintiffs, as the beneficiaries of the estate of the deceased, are seised with the locus to protect and preserve the property of the estate. It further held that the right of preservation of the estate is distinguishable from the right, over an interest to share in the property of the deceased. This is the right recognizable in equity to invoke the equitable remedy for fraud, mistake and the like.

[15] In *Ng Thau Shing v. George Justine & Other Cases* [2005] 6 CLJ 80, the *locus standi* of the plaintiff (Ungot) in the third action was challenged by the defendants. The actions in that case which were heard together concerned disputes arising out of land alienation applications cum purported sale transactions. A

preliminary objection was raised contending that Ungot had no *locus standi* since he had commenced the action without first obtaining the "Jadual Tiga" which is the equivalent of the letters of administration. Richard Malanjum J (as he then was) following *Ooi Jim* ruled that Ungot had the *locus standi* to commence the action. The reason given by the learned judge was that Ungot is only seeking for a declaration on the status of the signature of the deceased with the consequential relief sought for in that the title deed issued pursuant to the Power of Attorney, if the signature is declared forged, should be cancelled.

[16] In *Joseph Hayim Hayim and Another v. Citibank N.A. and Another* [1987] AC 730, the Privy Council speaks of the special circumstances which entitle a beneficiary to commence action against a third party. At pp. 748, Lord Tampleman stated: "These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owned by the trustees to the beneficiary to protect the trust estate or to protect the interest of the beneficiary in the trust estate." The Singapore Court of Appeal in *Wong Moy (Administratrix of the Estate of Theng Chee Khim, (deceased) v. Soo Ah Choy* [1996] 3 SLR 398 applied the principles set out in *Hayim*. The facts as stated in the headnotes are as follows:

> The appellant claimed to be the lawful widow of one Theng Chee Khim (Theng). They were married in 1952 according to Chinese customary rites and they had six children. In 1964, Theng purported to marry the respondent at the Registry of Marriages and thereafter set up home with the respondent. He remained with her and his children by her until he passed away in June 1995. The appellant obtained a grant of letters of administration to Theng's estate. She then commenced an action seeking, *inter alia,* a declaration that certain immovable property which had once stood in the name of the respondent was held on trust by the respondent for Theng. She also sought an enquiry and account as regards the properties, had been sold and the claim was principally directed at the proceeds of sale. She succeeded in obtaining an *ex parte* interim injunction restraining the respondent from disposing of or dealing with her assets within Singapore up to a value of $3.5m. The respondent in turn filed a caveat against the appellant's grant of the letters of administration.

The respondent subsequently applied to the High Court to discharge the injunction and also to strike out the appellant's writ of summons and statement of claim. She alleged that the appellant lacked the capacity to sue as she had not extracted the grant of letters of administration. As such, the writ was a nullity. The appellant then applied to amend her writ and statement of claim to specify that her action was brought in her alternative capacity as a beneficiary of the estate, and on behalf of her six children as beneficiaries. The High Court dismissed this application. The judge was of the view that the appellant's inability to extract the grant of letters of administration and the consequential delay in extracting the grant would not constitute special circumstances which might enable the appellant to commence an action qua a beneficiary. Consequently, the appellant's writ and statement of claim were struck out and the injunction was discharged. The appellant appealed, contending that there were special circumstances which enable her to maintain the action.

[17] In allowing the appeal, the court held that:

(1) As beneficiaries of the estate of Theng, the appellant and her children had no equitable or beneficial interest in any particular asset comprised in that estate, which was yet unadministered. It did not follow from this that a beneficiary of an estate which was unadministered or under administration had no legal remedy. He may institute an action to recover the assets of the estate where special circumstances could be shown to exist.

(2) Special circumstances were not confined solely to cases where the personal representative had defaulted in acting to recover the property. All the circumstances of the case should be considered, including the nature of the assets, the question of the personal representative and the reason for the default of the personal representative.

(3) In that case the failure to extract the Letters of Administrations of the estate was due to the inability of the appellant to obtain necessary clearance from the Commissioner of Estate Duty. The court held that the crucial consideration was that as the administratrix she was prevented by circumstances not within her control from taking action against the respondent as the grant of administration could not be extracted.That was sufficient to show that special circumstance

existed to enable her to bring the action qua a beneficiary and on behalf of her children as beneficiaries of the estate of Theng.

Our Findings

[18] We agree with the view expressed by the Singapore Court of Appeal in that the special circumstances should not be confined solely to cases where the personal representative had defaulted in recovering the property of the estate. We are of the view that all the circumstances of the case ought to be considered by the court in arriving at a just result. Secondly, following *Re Atkinson* and *Omar Ali bin Mohd.*, we think the beneficiary has at least an equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment.

[19] In the present case the action was commenced by the beneficiaries of the estate in order to regain the said land from the respondent whom they alleged had by fraudulent means transferred the land to himself. The respondent had also entered upon the land and damaged the fruit trees and demolished buildings found on the said land. Further, the said land is liable to be sold by the respondent to a third party. In that event the said land may be lost forever. This becomes more urgent in view of the decision of this court in *Adorna Properties Sdn. Bhd. v. Boonsom Boonyamit* [2001] 2 CLJ 133, which confers immediate indefeasible title to a purchaser in good faith for valuable consideration.

[20] Thus, the appellants have had to act fast in order to protect and preserve the estate of the deceased. Therefore, on the facts of this case, we find, there exist special circumstances for the beneficiaries to commence legal action against the respondent *qua* beneficiaries for the purpose of protecting and preserving the asset of the estate. Quite apart from that we also hold that the beneficiaries in the present case have at least an equity in the estate of the deceased to entitle them to seek a declaratory judgment. Thus, on the above grounds are agree with the learned counsel for the appellants that the appellants in this case had the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the asset of the estate.

[21] In the present case the High Court found that the title to the said land was obtained by the respondent through fraud and declared that the transfer of the said land to the respondent was null and void. The court ordered the respondent to transfer or cause to be transferred the said land to the appellants. The Court of Appeal agreed with the finding of the High Court that the respondent had obtained the title to the said land through fraudulent means but because of lack of *locus standi* ordered the said land to be retransferred to the respondent, but in the mean time ordered that a Registrar's Caveat be lodged against the said land pending disposal of the suit to be filed by the appellants.

[22] Now, in view of our finding that the appellants do have the *locus standi* to commence legal proceeding to protect and preserve the asset of the estate we hold that the appellants are entitled to the order as prayed for in prayer (c) of the claim. But as beneficiaries, we hold that the appellants are not entitled to claim for general and special damages on behalf of the estate; such a claim can only be made by the legal representative of the estate.

Conclusion

[23] In the result we order that the memorial in favour of the respondent in the Issue Document of Title and the Register Document of Title be deleted and a memorial in favour of the deceased be reinstated therein. The orders of the High Court and the Court of Appeal are accordingly set aside. The appellants shall have their costs here and in the courts below. Deposit to be refunded to the appellants.